



In the Matter of

Distribution of 1999, 2000 and 2001
Digital Audio Recording Funds

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} Docket No. 2002-6 CARP DD 99-01
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}

LIBRARY
OF
CONGRESS

ORDER

COPYRIGHT
OFFICE

On June 13, 2002, the Copyright Office received a Motion for Partial Distribution, from Broadcast Music, Inc.; the American Society of Composers, Authors and Publishers; the Harry Fox Agency, Inc.; and The Songwriters Guild of America (collectively, the "Settling Parties"). The Settling Parties request a 95% partial distribution of the 1999, 2000, and 2001 Musical Works Funds.

Copyright
Arbitration
Royalty
Panels

Ms. Alicia Carolyn Evelyn ("Evelyn"), a participant in this proceeding with an outstanding claim, filed a response to the June 13 motion on October 4, 2002, captioned as a motion to strike Settling Parties' motion for a partial distribution. She maintains that the Settling Parties' motion should not be considered because the motion was never served on the non-settling claimants and because it had been filed prior to the initiation of the proceeding.

Having duly considered the Settling Parties' motion for a partial distribution and Evelyn's arguments in opposition to their request, the Register of Copyrights is granting the motion for the reasons stated herein.

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Background

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On July 16, 2002, the Copyright Office published a notice in the Federal Register, announcing its decision to consolidate into a single proceeding the consideration of the distribution of the 1999, 2000, and 2001 Musical Works Funds pursuant to 17 U.S.C. §1005. In addition, the Office asked all claimants to these funds to file comments on the existence and extent of controversy and, in the case where the claimant expected to participate in a CARP proceeding to settle an outstanding controversy, to submit a Notice of Intention to Participate. 67 FR 46698 (July 16, 2002). In the same notice, the Office announced that the Settling Parties had filed a motion on June 13, 2002, for a partial distribution of 95% of the 1999, 2000, and 2001 Musical Works Funds and requested comment on the motion from those claimants who filed Notices of Intention.

Two Notices of Intention to Participate in the distribution proceeding, including comments on the extent of controversy, were filed with the Copyright Office. Evelyn filed one notice and the Settling Parties filed a joint notice. In her filing, Evelyn states that she has not reached a settlement with respect to her share of the 1999, 2000, and 2001 Musical Works Funds, Writers Subfunds. She also lists a number of objections in a separate document appended to her Notice of Intent to Participate, regarding the Settling Parties' motion and the Copyright Office's decision to consolidate the determination of the distribution of the 1999, 2000, and 2001 Musical Works Funds into a single proceeding. Her major complaint appears to be that she was not served with a copy of the motion for partial distribution. In addition, she asks the Office to deny the Settling Parties' motion because they failed to serve the motion on individual claimants, "to determine the earnings of those they represent, foreign and domestic, and ... to fully report the

distribution numbers.” Evelyn additional comments.

In the only other filing, the Settling Parties indicate that negotiations are continuing with regard to the outstanding controversies between it and the named claimants. It also asks that the Office designate a date certain as the date on which all parties in this proceeding report on the status of their settlement negotiations. Comments at 3-4.

Discussion

Section 1007(b) of the Copyright Act, title 17 of the United States Code, provides the authority for the Librarian of Congress to make a distribution of royalty fees in the absence of a dispute. It states that:

[T]he Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

17 U.S.C. 1007(b). Similar language in section 1007(c) provides separate authority for a partial distribution of any amounts that are not in controversy.

The Settling Parties continue to negotiate with individual claimants regarding the distribution of the Musical Works Funds for all three years and remain hopeful that it can resolve these controversies without a CARP. However, should these parties be unable to resolve their differences and reach a settlement, the remaining controversies could be resolved in a single CARP proceeding. See, e.g., 66 FR 9369 (February 7, 2001) and 62 FR 6558 (February 12, 1997). The Settling Parties also maintain that retention of 5% of the fees in these funds will be more than adequate to resolve any outstanding controversies and pay the cost of an arbitration proceeding. In support of their request, the Settling Parties cite the statutory authority granted to the Librarian of Congress in section 1007(c) which allows for a distribution during the pendency of a proceeding of any amounts not in controversy, provided that sufficient funds are retained to cover the reasonable administrative costs of the Library.

Only Evelyn opposes the partial distribution and does so only because she did not receive a copy of the motion from the Settling Parties. However, the Settling Parties' alleged failure to serve a copy on Evelyn at the time the Settling Parties filed its motion with the Copyright Office is not grounds for striking the motion or denying the request for a partial distribution. Prior to the initiation of a CARP proceeding, claimants may negotiate voluntary settlements among themselves and file a motion for partial distribution of specific royalty fees on the strength of these settlements even though the Office has neither initiated a distribution proceeding nor compiled a service list.

The normal procedure in these instances is for the Copyright Office to publish a Federal Register notice, requesting comments on the extent of controversy, Notices of Intention to Participate and comments on the motion for a partial distribution, which it did in this case. See, e.g., 67 FR 55885 (August 30, 2002); 66 FR 50220 (October 2, 2001); 66 FR 50219 (October 2, 2001); 65 FR 56941 (September 20, 2000); and 65 FR 54077 (September 6, 2000). The Office then creates the official service list from the Notices of Intention it receives in response to its notice. Only at this point must all parties serve each of the parties listed on the Office's service list with all subsequent filings related to this proceeding. See 37 C.F.R. 251.44(f). It is the creation of the service list that creates the obligation to serve all subsequent filings in a proceeding on specific parties, and not the filing of a motion with the Office before the creation of the service list.

Prior to the creation of the service list, the only way to give notice to potential participants in an upcoming CARP proceeding is to publish a notice in the Federal Register. Thus, when the Office receives a motion from an interested party in a distribution proceeding prior to the commencement of the proceeding, it publishes a notice in the Federal Register, announcing its receipt of the motion and a request for comments to the motion. In addition, the Copyright Office uses this opportunity to commence the distribution proceeding and makes a formal request for comments on the existence of controversy and Notices of Intention to Participate.

Clearly, Evelyn was aware of the motion because she filed comments on the extent of controversy, a Notice of Intention to Participate, and objections to the distribution of the DART funds as required by the notice. However, she chose not to get a copy of the motion from the Copyright Office prior to filing her initial comments and, on the due date for the filings, asked for a copy of the motion and additional time to respond.

In response to her request, the Office granted an extension for filing oppositions to the motion for a partial distribution to all parties on the service list and provided Evelyn with a copy of the motion. Thus, Evelyn had every opportunity to consider the motion and file her opposition, which she did on October 4, 2002.¹ Her opposition, however, is based only upon her mistaken impression that she and other non-settling claimants had to be served directly. As explained above, this is not the case. Even if her assertion was correct, any prejudice to Evelyn was cured by the Office providing her a copy of the motion and granting her additional time to respond.


There being no further substantive opposition to the motion, the Office turns to the merits of the motion. The only remaining issue is whether retention of 5% of the royalty fees in the 1999, 2000, and 2001 Musical Works is sufficient to cover the administrative costs of a distribution proceeding and settle the outstanding controversies among those claimants who have filed a Notice of Intention. Since Evelyn and the Settling Parties are the only two claimants that have filed the required notices, the Office only needs to consider the cost of a distribution proceeding and the value of Evelyn's claim. In the past, Evelyn has received less than 0.01% of the total amount available for distribution in any one year and the cost of a DART distribution

¹Evelyn's October 4 filing is characterized as a Motion to Strike Settling Parties' Motion for Partial Distribution of DART Musical Works Royalty Funds for 1999-2001. The Office, however, views the filing as an opposition to the motion on both procedural and substantive grounds and has considered it accordingly.

proceeding has not exceeded \$30,000. Based upon these findings, the Register finds that retention of 5% of the 1999, 2000, and 2001 is sufficient to cover the costs of a CARP proceeding and settle Evelyn's outstanding claim.

Wherefore, **IT IS ORDERED** that the motion for a partial distribution of 95% of the 1999, 2000, and 2001 Musical Works Funds, Writers and Publishers Subfunds, is **GRANTED**. The Copyright Office shall make the distribution on or after December 21, 2002, **provided that** each of the Settling Parties provides a signed agreement prepared by the Copyright Office no later than December 14, 2002, stating that any overpayment that results from the distribution of these funds shall be repaid to the Copyright Office with interest according to the amount that would have accrued if the principal had remained in the fund. In addition, the Settling Parties must provide all pertinent information to effect the transfer of the funds to the Licensing Division of the Copyright Office no later than December 15, 2002.

SO ORDERED.


Marybeth Peters,
Register of Copyrights.

DATED: December 3, 2002